

FILED

APR 17 2013

**Clerk, U.S. District Court
District Of Montana
Billings**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA,

Cause No. CR 04-87-BLG-RFC

Plaintiff/Respondent,

vs.

ORDER DENYING § 2255 MOTION
AND DENYING CERTIFICATE
OF APPEALABILITY

RONALD E. SMITH,

Defendant/Movant.

On February 5, 2013, Defendant/Movant Ronald E. Smith filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mot. (doc. 805) at ¶¶ 1-2. Smith is a federal prisoner proceeding pro se.

Smith asks that his sentence be altered under U.S.S.G. § 5G1.3(b) so that he will receive credit for 692 days served in custody between April 30, 2004, and March 22, 2006. March 22, 2006, is the date of his original sentencing. Minutes (doc. 490). This Court's records do not reflect what happened on April 30, 2004. Smith's own exhibits refer to June 24, 2004; that makes more sense, as Smith was arrested on the

federal warrant on June 23, 2004. Warrant Return (doc. 54).

But the record also shows that Smith was sentenced in state court on June 21, 2004, for an offense he committed on October 28, 2002. Presentence Report ¶ 151. All the offenses alleged in this case occurred between April 2003 and December 2003. Superseding Indictment (doc. 91). Neither the quantity of methamphetamine found in the vehicle he abandoned nor any other aspect of the state offense were considered as “relevant conduct to the instant offense of conviction,” and the state offenses did not form “the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments).” U.S.S.G. § 5G1.3(b). Presentence Report ¶¶ 87-90 (Zindler), 131-141. Section 5G1.3(b) does not apply. Smith is not entitled to a reduction of his federal sentence.

Smith is not entitled to a certificate of appealability because he does not allege that he was deprived of a constitutional right, 28 U.S.C. § 2253(c)(2), merely that he was entitled to application of a guideline that does not, in fact, apply.

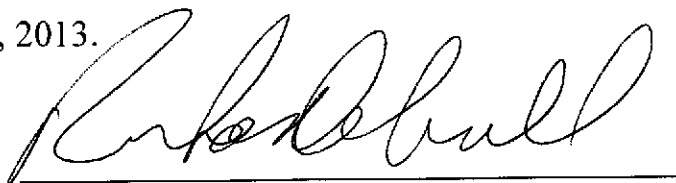
Accordingly, IT IS HEREBY ORDERED as follows:

1. Smith’s motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255 (doc. 805) is DENIED;
2. A certificate of appealability is DENIED. The Clerk of Court shall

immediately process the appeal if Smith files a Notice of Appeal;

3. The Clerk of Court shall ensure that all pending motions in this case and in CV 13-18-BLG-RFC are terminated and shall close the civil file by entering judgment in favor of the United States and against Smith.

DATED this 17th day of April, 2013.

A handwritten signature in cursive script, appearing to read "Richard F. Cebull", written over a horizontal line.

Senior Richard F. Cebull
United States District Court